No. 8781

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

JESSE H. SHREVE and ARCHIE C. SHREVE,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the District Court of the United States for the District of Arizona

BRIEF FOR APPELLEE

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Upon Appeal from the District Court of the United States for the District of Arizona

BRIEF FOR APPELLEE

OPENING STATEMENT

We do not believe that appellants' brief contains sufficient statement of the facts or the evidence to enable the Court to properly determine all of the questions raised. However, rather than set forth the statement of the facts which the Government*

*Appellee is referred to as "Government" throughout this brief.

contends is necessary, we will take up the appellents' argument in the order that it appears in their brief and, where it becomes necessary, we will quote from the record in order to properly present the Government's theory.

ARGUMENT

FIRST

The first argument advanced by appellants covers Assignment of Error I. Appellants contend that the indictment was duplicitous because of certain allegations in the first count (Appellants' Brief, p. 13). Appellants argue that the word "hereinafter", as used in the indictment, refers not only to the subsequent portions of the count in which it is used but also to all subsequent counts. It is clear from the reading of the indictment as a whole that the word "hereinafter" as used in the first count refers only to the letters and representations affecting the scheme and artifice set out in the first count and repeated in the second and third counts of the indictment. After alleging in the second paragraph of the indictment that the defendants had devised and intended to devise a scheme, etc., and after naming the victims, Sweetland, Hohenstein and Baker, the paragraph concludes with this phrase, "which said scheme and artifice was substantially as follows" (2)*.

Does not this definitely and clearly advise the defendants that the misrepresentations immediately thereinafter set forth were made in connection with

*Unless otherwise indicated, figures in parentheses refer to pages of the printed transcript of record.

the scheme and artifice mentioned in paragraph two of the indictment?

The same is true of the letters set out in the first three counts of the indictment. Each letter is preceded by an allegation as follows: "Having devised and intended to devise said scheme and artifice as aforesaid, the defendants, for the purpose of executing said scheme and artifice did * * * place and cause to be placed in the United States Post Office * * * a certain letter" (6, 10, 12). This allegation is followed by setting the letters out in full. When we read this last allegation in connection with the allegations complained of by appellants, there can be no misunderstanding as to what the word "hereinafter" refers to.

As is said in the Government's brief in the former appeal, the construction suggested by appellants is strange, unnatural and absolutely unsound. The defect, if any, is one of form only and should be disregarded.

18 U. S. C. 556.

Cowl v. United States, 35 F. (2d) 794-798.

Horn v. United States, 182 Fed. 721-726.

SECOND

The second division of appellants' argument covers Assignment of Error II (Appellants' Brief, p. 14). Appellants contend that the bill of particulars furnished by the Government prior to the trial,

which was the third trial of the case, was evasive, uncertain and incomplete. No where in their brief do appellants point out how or in what manner they were prejudiced by the ruling of the trial court. To suggest that appellants could be prejudiced by the failure to furnish any particulars whatever for the third trial of the case, would be to indulge in a fiction too unreasonable to be given serious consideration by any court.

Ciafirdini v. United States, 266 Fed. 471.

A bill of particulars was furnished. The trial judge, in his discretion, determined that the Government had sufficiently complied with the order for a bill of particulars. Without a more specific and definite showing of prejudice than appears in the record in this case, this assignment should be promptly disposed of. The authorities cited in our brief in the former appeal are particularly applicable where there has been a prior trial and the trial court is satisfied with the bill furnished.

Wong Tai v. United States, 273 U. S. 77-82.

Dunlop v. United States, 165 U. S. 486-491.

Rosen v. United States, 161 U. S. 29-35.

Appellants cite decision of this Court in support of their contention—*Kettenbach v. United States*, 202 Fed. 377. We are willing to have the Court apply the principles laid down in the Kettenbach case to the present case.

THIRD

This division of appellants argument is based upon Assignment of Error XXIV (Appellants' Brief, p. 16). Appellants contend that the Court erred in permitting witness Fierstone, a Government accountant, to testify that stock in the Security Building and Loan Association held by the Century Investment Trust Corporation valued at $99,457.50, was charged off as a loss on December 16, 1931. Appellants' argument is based upon two grounds, first, the transaction occurred after the last date of any indictment letter; second, that the transaction occurred subsequent to the date any scheme was executed as fixed by the bill of particulars. The Court instructed the jury that evidence relating to transactions after October 24, 1931, would only be considered for the purpose of determining intent (876). There was no exception taken to this instruction. The instruction is a correct statement of the law. The evidence objected to was properly admitted for the purpose of showing intent.

Stern v. United States, 223 Fed. 762-764.

Little v. United States, 73 F. (2d) 861-867.

Samuels v. United States, 232 Fed. 536-542.

In the case of *Stern v. United States*, supra, it appears that after appellants were arrested they effected the sale of property mentioned in one of the counts of the indictment. The Court said this was a fact for the consideration of the jury.

The second ground advanced in support of this

assignment is without merit for the same reasons set forth herein in discussing the first ground, namely, that acts of the defendants and circumstances after the commission of the crime, frequently point more conclusively and unerringly to the guilt of those accused than do their prior acts. The authorities last above cited support the ruling of the trial court.

Appellants contend that the Guardian Western Company is not mentioned in the indictment or bill of particulars and, therefore, according to their theory, its name could not even be mentioned at the trial. The Guardian Western Company had nothing whatever to do with the transactions covered by the testimony. The witness' testimony was based upon the books and records of the Century Investment Trust and the Arizona Holding Company, both of which companies were mentioned in the indictment and bill of particulars and the books of both companies were in evidence. The defendants were sufficiently advised by both the indictment and bill of particulars that they would be required to meet testimony touching upon the contents of those books.

FOURTH

Under this division appellants have grouped Assignments of Error III, IV, V, VI, XXXV, VII and XXV (Appellants' Brief, ps. 20-40). They are all based upon the Court's rulings sustaining objections to questions asked defendant Archie Shreve relating to certain conversations. In order to properly present this matter to the Court, we deem it necessary to refer to that part of the record containing

the conversations to which the Government witnesses Perkins and Hobbs testified. In this connection we do not feel that it is necessary to set out in this brief any conversations except the ones where the defendant Archie Shreve was present, as he is the only witness offered in behalf of the defendants in regard to such conversations.

The only conversations testified to on direct examination by the witness Perkins is found in the record on pages 615, 616, 621, 622 and 623. No where in any of this testimony does it appear that the defendant Archie Shreve was present at any of these conversations. Testimony set out in appellants' brief (30-31) was part of the cross-examination of the witness Perkins (641-642). We do not believe that the able counsel for appellants means to seriously contend conversations can be opened up on cross-examination and then be used as the basis for introducing self-serving statements of the defendants.

Even in the cross-examination set out in the brief the witness definitely stated, "Mr. Whitney and Mr. Osborne were not discussed in the conversations in San Diego at which Jesse Shreve, Archie Shreve, John Hobbs and myself were present in Jesse Shreve's home." All that the Government testimony amounted to was that the witness did have a conversation with defendant Jesse Shreve in regard to the liquidation of the company and there was no attempt to detail what was said.

The same is true of the testimony of witness Hobbs, set out in the brief (Appellants' Brief, ps.

31-33). He mentions only the subject of the conversation and did not attempt to detail what was said. Keeping in mind the testimony of Perkins and Hobbs in regard to these conversations, let us now consider the assignments of error based upon the Court's refusal to permit defendant Archie Shreve to testify as to certain conversations between those witnesses and the defendants.

Assignment of Error III (Appellants' Brief, ps. 20-23):

An effort was made to have defendant Archie Shreve testify as to what was said in the conversation between Jesse Shreve, Perkins and the witness which occurred "at or about the time the Century Investment Trust and Security Building and Loan Association opened offices in Phoenix." No attempt was made to identify this conversation with any conversation Perkins had testified to. Therefore, even under the defendants' theory, no proper foundation was laid for its admission. This was a very apparent attempt on the part of the defendants to prove a defense by introducing self-serving declarations about conditions and transactions instead of proving the conditions and transactions by proper direct and competent evidence. The purpose of the offered testimony is made clear by counsel's own statement: "*MR. HARDY: It is not laid for the purpose of impeachment. The question was asked and predicated in regard to future business of the Century Investment Trust and the Arizona Holding Corporation*" (*763*). No claim was made by counsel at the time that the evidence was offered for the purpose of clearing up and explaining a conver-

sation the witness Perkins had testified about.

Assignment of Error IV (Appellants Brief, ps. 23-25):

The statement in appellants' brief shows that the witness Archie Shreve was permitted to testify that there was a conversation between the parties named and that the conversation was with reference to the affairs of the Security Building and Loan Association. That was all that Hobbs had testified to (389-390).

The offer of proof found in appellants' brief (Appendix, ps. 1-2), contains a statement of what defendants expected to prove in regard to this conversation. This offer in evidence is not materially different from the testimony of the witness Hobbs except that it details what was said. The purpose of the Government's evidence was not to prove what was said, but merely to prove that Hobbs and Perkins did go to San Diego to consult with the defendants about the affairs of the different companies. These facts are admitted both by the testimony of the defendant Archie Shreve and by the offered proof. The exclusion of the offered evidence could not have possibly prejudiced appellants.

Assignment of Error V (Appellants' Brief, ps. 25-26):

It is contended under this assignment that the Court refused to permit the defendants to make an offer of proof with regard to the excluded testimony concerning the conversations referred to in

Assignments of Error III and IV. The Court did give appellants permission to make such an offer. The Court merely refused to permit them to make the offer in the presence of the jury and instructed counsel to write it out (912). We would like to say at this time, in connection with this offer as well as in connection with all the offers which are set out in the appendix to appellants' brief, that the Court never ruled on any such offers. This omission of the ruling on the part of the Court was due, perhaps, to the fact that appellants failed to ask for such a ruling. We do not believe that any litigant should be permitted to file a written offer of proof with the Clerk and then, without asking the Court to rule upon such offer, assign the failure of the Court to rule as error.

Assignment of Error VI (Appellants' Brief, ps. 26-28):

This is such a clear example of a self-serving statement that it seems unnecessary to devote a great deal of time and space to discuss it. There is no claim by appellants that there was any testimony in behalf of the Government in which the conversation offered in evidence was mentioned. The offer of proof (Appendix, Appellants' Brief, ps. 4-5) clearly discloses the self-serving nature of the offered evidence. The appellants have offered no possible theory under which it might be admissible.

The offered testimony was in regard to the alleged conversation between the defendants and the witness Perkins concerning Government's Exhibit 207. No conversation having been testified to by

any of the Government's witnesses, this was just an attempt to put in defensive matter by way of self-serving statements in place of putting the defendant Jesse Shreve on the stand to testify directly regarding his connection with the exhibit in question (798, 821).

Assignment of Error XXXV (Appellants' Brief, p. 28):

Appellants attempted to have the defendant Archie Shreve testify in regard to a conversation between Jesse Shreve, Perkins and the witness, which the witness claimed took place in San Diego, California, in February, 1930. Appellants failed to point out the part of the record where there is any testimony on the part of the Government concerning any such conversation. We have searched the record and have failed to find any such testimony on the part of the Government. Therefore, under appellants own theory, the evidence is inadmissible, there having been no proper foundation laid for its introduction.

Assignment of Error VII (Appellents' Brief, p. 29):

This assignment is based upon the alleged refusal of the Court to permit appellants to make an offer of proof concerning the conversation referred to in Assignment of Error VI. The alleged conversation was with reference to Government's Exhibit 207. The assignment is without merit, first, because the Government introduced no evidence in regard to any such conversation; second, because the

Court did not refuse permission to make the offer; third, the offer was made in writing and filed with the Clerk. Appellants failed to ask for any ruling upon this offer and the Court made none.

In the case of *Carver v. United States*, 164 U. S. 694, cited by appellants, the evidence excluded concerned a conversation which was not only part of the res gestae but a Government witness had testfied to details of the conversation. In addition, the conversation was between the defendant and the deceased, whom he was accused of killing. In the present case, the conversations were all between co-schemers who were accused jointly of devising and intending to devise a scheme to defraud.

The case of *Bogk v. Gassert*, 149 U. S. 17, cited by appellants, was a civil case in which one of the parties was permitted by the Court to testify in regard to the conversation had at the time of the execution of certain written instruments. The defendant then was denied the right to give his version of the transaction gathered from the same conversation. The situation in the present case is entirely different and we cannot see where the decision in the Bogk case supra has any application.

In the case of *Perrin v. United States*, 169 Fed. 17, the excluded evidence was documentary and was all part of the same transaction. We wish to call the Court's attention to the authorities cited in Judge Gilbert's dissenting opinion:

> "It follows from the general principle that distinct or separate utterance is not receiv-

able under this principle. The boundary line here is usually defined by saying that all that was uttered at the same time on the same subject is receivable." (Wigmore on Evidence, Section 2119).

In the present case we contend that, in many of the instances complained of, there was no testimony on the part of the Government where the conversations referred to by the witness for the defense was even mentioned. In the instance where those conversations had been mentioned by the Government witness, the conversation itself was not repeated and all the Government's evidence brought out was the fact that there had been a conversation about the affairs of the corporation involved. The witness for the defendants was permitted to go as far in his testimony as were the witnesses for the Government. Under the law as stated in the above quotation from Wigmore this was all appellants were entitled to do.

In this connection, we think it appropriate at this time to complete the quotation from Corpus Juris, the first part of which is set out in appellants' brief (p. 33):

> "* * * They are excluded not because they might never contribute to the ascertainment of the truth, but because if received they would most commonly consist of falsehoods fabricated for the occasion, and would mislead oftener than they would enlighten." (16 C. J. 1265, page, 636.)

We quote the foregoing because we believe it ex-

plains the reason why defendants in a criminal case should not be permitted to go beyond the boundary line mentioned in the above quotation from Wigmore.

This is particularly true in the present case where the appellant, Jesse Shreve, did not take the stand and subject himself to cross-examination. An effort was made to introduce these self-serving statements of Jesse Shreve through the testimony of a co-defendant who claims to have overheard the statements. This testimony was not offered for the purpose of proving there had been a conversation, the main purpose being to prove the truth of the self-serving statements.

Assignment of Error XXV (Appellants' Brief, p. 38):

This assignment is based upon the admission in evidence of Government's Exhibit 207 (943). This exhibit was identified by Perkins (653), and also by Government's witness, Manuel J. King (722). Manuel J. King identified the exhibit as one he received through the mails at Tucson, Arizona, when he was getting dividends from the company. The objections to the exhibit are set out in the record and will not be repeated here (723). It was not necessary to have direct evidence that Jesse Shreve deposited this instrument in the mail himself. We believe the above testimony was sufficient to prove the exhibit was mailed out by the Century Investment Trust. During all the time of this company's existence it had the same offices as the Arizona Holding Corporation, Phoenix, Arizona (258), and

at all times was under the direction of some one of those charged in the indictment. We think the evidence as a whole clearly shows that Jesse Shreve, Archie Shreve, Dan Shreve, Glen Perkins, John Hobbs and J. G. Cash all had a part in devising and carrying out the scheme set out in the indictment. There is evidence that the appellant Archie Shreve was for a time in actual charge of the Phoenix office. When he was not in charge, Dan Shreve or Glen Perkins, both of whom are proven co-schemers, were in charge and there is also evidence that at all times Jesse Shreve was in fact the man in control of the management and had the last say in connection with the affairs of all the companies. All of this is sufficient to justify the introduction of Government's Exhibit 207.

Levinson v. United States, 5 F. (2d) 567.

McIntyre v. United States, 49 F. (2d) 769.

Havener v. United States, 49 F. (2d) 196.

Cochran v. United States, 41 F. (2d) 193.

FIFTH

Assignments of Error VIII, IX, X, XI and XII (Appellants' Brief, ps. 41-45):

All of the assignments in this group relate to the admission in evidence of exemplified copies of deeds, mortgages and assignments of mortgages, as evidence on behalf of the Government. The objection to these exhibits is that exemplified copies were not admissible because the Government failed

to prove the originals were not available. The Act of Congress definitely settles the question raised by these assignments.

28 U.S.C.A. 688 (and citations thereunder).

Appellants contend that that section applies only to foreign records. The last sentence of the section contradicts appellants' contention in this regard. If we follow appellants' construction of this section, we then have the anomalous situation of one rule of evidence as to records of the state where the Federal Court is sitting and a more liberal rule as to records of another state.

Appellants' theory is not supported by any of the authorities cited under Section 688 supra. On the contrary, they hold opposite to appellants' theory.

Myres v. United States, 256 Fed. 779-782.

SIXTH

Assignments of Error XVIII, XIX and XX (Appellants' Brief, ps. 59-62):

These assignments are based upon the admission in evidence of the books and records of the corporations named in the indictment. We disagree with some of the conclusions appellants have drawn from the testimony in the case. In the first place, the witness Watt testified that he did not rewrite any of the books of the Security Building and Loan Association (347). This is the only company involved in the first three counts of the indictment. The witness also stated that he did not rewrite any books of the Arizona Holding Corpora-

tion, but merely brought some of them up to date (348). He further testified that it was not necessary to make any changes in the books of the Security Building and Loan Association (349). He further testified that the entries made by him in the books of the Century Investment Trust and the Arizona Holding Corporation were all made from the original sources (354). In other words, the books were kept in the regular order of business.

If appellants' position is correct and the books and records were not admissible in evidence, they were made inadmissible by the acts and omissions of appellants themselves. To make accused persons benefactors of their own irregularities, would be to announce a dangerous principle of law. Defendants in criminal cases are now surrounded by ample protection without enlarging that protection to the extent asked for by appellants.

The evidence concerning the books was practically identical with the evidence at the prior trial and this same question was raised on appeal and this Court passed upon it in its former opinion. *Shreve v. United States*, 77 F. (2d) 2, 7. The quotation from the opinion contained in appellants' brief settles this question contrary to appellants' contention (Appellants' Brief, p. 64). The authorities in support of the admissibility of books and the circumstances in this case are unlimited.

Butler v. United States, 53 F. (2d) 800, 806.

Barrett v. United States, 33 F. (2d) 115.

The former opinion in this case was not the first time this Court had announced such a rule.

Lewis v. United States, 38 F. (2d) 406, 414.

The opinion in the Shreve case, supra, became the law of this case and controls the actions of counsel and the rulings of the Court in the subsequent trial. The books of the Security Building and Loan Association were properly admitted in evidence in proof of the first three counts and the books of the Century Investment Trust and the Arizona Holding Corporation were properly admitted in evidence in proof of the remaining counts.

SEVENTH

Assignment of Error XXIII (Appellants' Brief, p. 67):

This assignment is based on the testimony of Fierstone with reference to an audit of the books of the Century Investment Trust, and error is claimed solely upon the ground that the books themselves were not properly in evidence.

Our answer to appellants' sixth argument is also an answer to this assignment. In the brief, however, (Appellants' Brief, p. 66), appellants precede their argument on this assignment with the statement that the testimony of Fierstone based upon his audit of the books of the Security Building and Loan Association and the Arizona Holding Corporation was also erroneously admitted. While we feel that the former opinion is decisive of that question, we want

to again call the Court's attention to the fact that the appellants' complaint of the books of the Century Investment Trust and the Arizona Holding Corporation does not apply to the books of the Security Building and Loan Association.

EIGHTH

Assignments of Error XIII, XIV, XV and XVI (Appellants' Brief, ps. 68-73):

These assignments are based upon the admission in evidence of certain books and records of the First National Bank of Prescott, Arizona, being Government's Exhibits 84, 90, 92, 93 and 94.

Assignment of Error XIII (Appellants' Brief, p. 68):

This assignment has to do with the admission in evidence of Government's Exhibit 84, consisting of the daily statement showing the condition of the First National Bank of Prescott. This exhibit is a part of the bookkeeping system of the bank and one of the permanent records. Witness Trott testified he made the record himself and that the entries were correct (298, 299, 300).

There is nothing on the face of this exhibit or in the record anywhere that shows how it could possibly be prejudicial. The appellants in their brief have failed to point out how any prejudice could arise from the introduction of this exhibit. So, under the well-settled rule that harmless error will not be considered, there can be no merit to this assignment, whatever view we take.

Assignment of Error XIV (Appellants' Brief, p. 70):

This assignment refers to Government's Exhibit 90. The witness Evans testified that payment for the certificates of deposit was delivered to him. At the time of the making of the bank record, which is Exhibit 90, the witness was in sole charge of the management of the bank. He testified that the item was a correct record of the transaction (308). In spite of his testimony on cross-examination, this was the first entry of this transaction. There undoubtedly were other entries in the books of the bank showing the various steps in the history of this $20,000, but the item in question is the recorded history of one of those steps and, as to that fact, must, of necessity, be an original and a permanent record thereof.

Assignment of Error XV (Appellants' Brief, p. 71):

This assignment refers to Exhibits 92, 93 and 94. The same witness, Evans, testified in regard to the entries included in these exhibits; that they were made by him and that they were correct records of the transaction which they purported to record (311). In connection with this witness' statement on voir dire examination (312), to the effect that these items were secondary and auxiliary records, it must be apparent, even from the cold record in this case, that throughout his testimony this witness was attempting to shield the appellants. The items referred to were not secondary or auxiliary records. They were, in fact, not only the first per-

manent records of these particular transactions but they were, in our opinion, the only permanent records thereof. Evans, on further questioning, stated that the entry he referred to on voir dire was one of the steps of the complete record and that Exhibit 91 was the first record (313). In other words, it was a record of the first step in the transaction. The entries in Exhibits 92 to 94, inclusive, were introduced in evidence to show the subsequent steps in this transaction and without a record of these steps there would be no complete record of the transaction. Even if we were to apply the strict and stringent interpretation of the opinions of this Court which appellants have given them, we have met that requirement and the foundation for the introduction of the records was complete.

Barrett v. United States, 33 F. (2d) 115.

Butler v. United States, 53 F. (2d) 800.

Foster v. United States, 178 Fed. 165.

In *Barrett v. United States*, supra, the Court, in discussing the fact that the books were offered as proof, said:

> "If the books, properly identified, assist in proving that fact they are admissible whether Barrett knew of the books or not."

And, quoting from *Butler v. United States*, supra:

> "Books of account are often received to prove a material fact where the party has no

connection with the books or the business reflected by them."

NINTH

Assignments of Error XXI and XXII (Appellants' Brief, ps. 81-83):

Assignment of Error XXI has to do with testimony of Government witness Schroeder, which testimony was based upon his audit of the books of the three companies named in the indictment.

Assignment of Error XXII is based upon the Court's failure to strike his testimony referred to in Assignment of Error XXI.

The only objection to the testimony was that it was based upon an audit of books other than those in evidence. This is also the grounds of the motion to strike.

We submit that appellants have placed an erroneous construction upon the testimony and, therefore, necessarily have drawn a wrong conclusion. Every question asked the witness in reference to his audit confined him to the books in evidence (657-658). The witness himself stated at the very outset "the audit I made and which I will testify in regard to, is made on the books now in evidence in this case and based upon those alone." (657).

It is true the witness testified in regard to examination of other records and public documents (Appellants' Brief, ps. 84-86), but he very definitely

stated that nothing in any of such records entered into his audit as testified to (687). Undoubtedly in the auditing of a set of books of any corporation, an auditor might search through the books of many other companies or through the entire record in some public office. Let us assume that in all of such search, he failed to find a single item that had any connection or reference to the company whose books he was auditing. Would it be necessary to bring into court every book and record that the auditor examined and searched through before he could testify as to his audit? Ridiculous as this proposition sounds, it seems to us to be the position appellants have taken. Starting with a false premise and necessarily coming to a wrong conclusion, the authorites cited in support of appellants' contention are not applicable to the true facts in this case.

TENTH

Assignments of Error XXVI and XXVII (Appellants' Brief, ps. 87-89):

Assignment of Error XXVI is based upon the admission in evidence of Government's Exhibit 170 (946).

Assignment of Error XXVII is based upon admission in evidence of Government's Exhibit 172 (947).

Exhibit 170 is a real estate mortgage dated April 16, 1930, from one Perry to Yavapai County Savings Bank, on property located in Yavapai County (548).

Exhibit 172 is a Sheriff's deed dated May 3, 1933, of the same property to the Yavapai County Savings Bank, issued in pursuance of a foreclosure of Exhibit 170.

Appellants have missed the purpose for which these exhibits were introduced in evidence. It was not for the purpose of showing that no title had been received by reason of the deed from Blackburn, dated June 26, 1930 (Gov. Ex. 144) (517), the Perry mortgage would in no way prevent Blackburn from having and conveying title two months after the Perry mortgage was executed.

The purpose of this evidence was to show that on July 14, 1930, when the property was deeded to A. E. Reyburn (Gov. Ex. 141) (512), and she executed a mortgage back for $8700, and that on July 21, 1930, when this Reyburn mortgage was assigned to the Security Building and Loan Association (Gov. Ex. 143) (516), the Reyburn mortgage was not a first mortgage as represented by the appellants.

Schroeder testified (576) that the Reyburn loan was included in the figures $193,929.46, found in Government's Exhibit 160 (659). The Perry mortgage executed in April, 1930, and not finally foreclosed until the Sheriff's deed in May, 1933, must have been a prior lien to that of the Reyburn mortgage. Furthermore, the loan was in excess of the value of the property. Russell testified that in 1930 the property was worth $6,000 (551). Further evidence that this mortgage was fraudulent is the fact that Reyburn, the mortgagor, was used merely as a dummy for the entire transaction (513).

Authorities cited in appellants' brief, in support of their argument that the Sheriff's deed was not admissible, are not applicable. The law that you cannot prove the facts upon which a judgment was rendered by mere proof of the judgment as against a third party is, we concede, well settled, but it is also well settled that a judgment is evidence of its rendition and the authorities quoted from in appellants' brief (p. 92) so state.

ELEVENTH

Assignment of Error XXVIII (Appellants' Brief, p. 94):

This assignment is based upon the testimony of the witness A. W. York. The answers of the witness are all set out in appellants' brief and we will not repeat them in full. The first answer on page 94 of the brief merely states the witness had received a letter from his daughter about a proposition the company she worked for had to make. This was only a preliminary explanation on the part of the witness. There is nothing harmful or prejudicial in it.

The first part of his second answer (Appellants' Brief, p. 95) is identical with the first answer. We quote the last part of the answer:

> "The purpose as I later on understood was for me to come over here and take charge of a ranch in the vicinity of Holbrook." (948).

This does not purport to be a statement of any-

thing his daughter said. It may well be that the understanding of the witness was based on conversations with appellants. This quoted part of the answer was not responsive and on a proper motion could have been stricken. No such motion was made.

In view of the overwhelming proof of the guilt of the defendants, this assignment is, in our opinion, frivolous, in spite of appellants vigorous and sincere plea for the preservation of salutary standards of law. We supplement appellants' plea by asking that justice be done in this case.

TWELFTH

Assignment of Error XXIX (Appellant's Brief, p. 97):

This assignment is based on the Court's sustaining an objection to a question asked witness Crane, who was an accountant testifying on behalf of appellants. The question asked the witness was not sufficiently broad or comprehensive to meet the requirements of a hypothetical question. It left too much to the imagination of the witness. We assume that the nature of the business, the exact relations between the Holding Company and the subsidiary would be elements that would have to be taken into consideration. A second question as to whether a certain manner of accounting is approved by the Internal Revenue Bureau of the United States is clearly improper. The system of accounting approved by the Internal Revenue Bureau for income tax purposes would have no possible bearing on this case. Even assuming that the method of having

the expense items of the Security Building and Loan Association paid by the Century Investment Trust, as testified to by Fierstone (Appellants' Brief, ps. 98-100), was the correct method of accounting, the Government had the right to show, as it did by Fierstone's testimony, the difference such a system would make in the showing of profit, in order for the jury to determine whether or not the representations made by the appellants were misleading.

THIRTEENTH

Assignments of Error XXXII and XXXIII (Appellants' Brief, ps. 103-104):

These two assignments have to do with the Court's instructions.

Assignment of Error XXXII (Appellants' Brief, p. 103):

The Court properly instructed the jury that a withdrawal from a scheme could not be effected by intent alone, but that there must be some affirmative action. Defendants' exception was on the ground that the Court should have defined what would constitute an affirmative act. The authorities cited by appellants (Appellants' Brief, p. 106), to the effect that the Court should explain the meaning of a technical or legal term occurring in the instructions, are not in point for the reason that the term "affirmative act" is neither a legal nor a technical term. This instruction was easily understood and easily applied. Any juror should be able to distinguish between intent and action. The use of

the word "intent" makes the meaning of the words "affirmative action" plain. A definition is unnecessary. If the Court undertook to tell the jury just what acts would be necessary to effect a withdrawal, it would have necessitated an analysis of almost the entire evidence in the case. Appellants might have had a meritorious complaint in that event. Whether the appellants withdrew from the schemes or when they withdrew were questions of fact for the jury to determine.

Assignment of Error XXXIII (Appellants' Brief, p. 104):

Appellants complain because the Court refused to instruct the jury that there was no evidence the appellants made any representations that the Security Building and Loan Association had a paid-in capital stock of $300,000, as alleged in the indictment.

Again we say that it was for the jury to determine what charges had or had not been proved. The jury was fully instructed that the indictment was not to be considered as evidence (855-856). This was all that was necessary to protect the rights of the appellants. We must assume that the jury followed the instructions of the Court. The Court also instructed the jury that the Government need not prove all of its allegations, only enough to prove the guilt of the defendants (868).

FOURTEENTH

Assignment of Error XXXIV (Appellants' Brief,

p. 107):

This assignment is based upon the Court's denial of appellants' motion for an instructed verdict. In their brief appellants abandon all grounds upon which this motion is based, except as to the sufficiency of the evidence to connect the appellants with mailing the indictment letters.

Appellants make much of the fact that counsel for the Government remarked that it had not been shown that the witness Archie Shreve had knowledge "where or how or who prepared this" (referring to the indictment letters). This position of the Government counsel was justified, the witness stating that he never heard of any of the letters or knew anything about them or had anything to do with them, etc. (796).

We know of no principle of law in connection with cases of this kind that is so well established as the one that each one of the schemers need not participate in every act done in the furtherance of a scheme. He may not know what his partners are doing, but he is bound by their acts.

Silkworth v. United States, 10 F. (2d) 711.

Schwartzberg v. United States, 241 Fed. 348.

Wilson v. United States, 190 Fed. 427.

Appellants concede that it had been established by the evidence, (1) that it was a business custom to mail the letters; (2) that the letters were mailed in the general or regular course of business (Apellants' Brief, p. 111).

We claim that in addition to the above facts, we have also complied with the rules stated in *Freeman v. United States*, 20 F. (2d) 748, which is cited in appellants' brief, to the effect that the custom of mailing was the appellants'. It is clearly proven that Jesse Shreve was the actual head of the company. He placed men in charge of the different offices. Therefore, anything done by these men was under the authority of Jesse Shreve and he is bound. This is particularly true where the men in charge are proven to be co-schemers such as Dan and Archie Shreve and Glen Perkins, and we believe that this could also include John Hobbs and J. G. Cash. As was said in the Beck case, 33 F. (2d) 107, cited in appellants' brief (p. 109):

> "That the mails were used is clear. That the defendant Beck is bound if Barrett used the mails in the ordinary course is not open to serious dispute. The law does not now require an intent to use the mails as part of the scheme, as formerly. It is sufficient if they are used. Beck placed Barrett in the position of general manager of the corporation, leaving to him the direct management of the business while Beck primarily looked after his own business."

In the Beck case, however, there was no evidence of Barrett's connection with the mailing.

The testimony set out in appellants' brief, (ps. 30-40) does not contain all of the evidence connecting the appellants with the mailing of the indictment letters. We believe, however, it is sufficient

to prove their connection therewith. Many of the letters were signed by Perkins or Dan Shreve and mailed out under their direction. In order to get all the evidence of appellants' connection with the mailing, it is necessary to read the entire testimony of Perkins. We particularly refer to the following places in the record, pages 615, 616, 621, 622, 623, 635 and 636.

Referring to Jesse Shreve, Perkins said:

> "We knew him as the boss, he was the man who directed us * * * (636). * * * The orders for the Tucson office came from the Phoenix office. * * * It came from J. H. Shreve or Archie Shreve or when Dan Shreve was here." (636).

Without repeating it, we wish to call the Court's attention to the entire testimony of Perkins found on page 637 of the record. There is further testimony in the record on the question of mailing, which we will not quote (638, 639, 652).

CONCLUSION

We submit that there is ample evidence connecting the appellants, and each of them, with the mailing of the indictment letters.

Having discussed all the issues raised by the appellants, we respectfully submit that, because of the overwhelming proof of appellants' guilt and the lack

of any prejudicial error, the judgment should be affirmed.

Respectfully submitted,

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